(4)

No. 05-1101

Supreme Court, U.S.
FILED
MAR 30 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TIMOTHY W. OMER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Counsel for Respondent
MICHAEL J. SHERWOOD
MICHAEL J. SHERWOOD, P.C.
401 N. Washington/P.O. Box 8358
Missoula, Montana 59807
Telephone: (406) 721-2729
Facsimile: (406) 728-8878

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTIONS PRESENTED

1. Whether this Court should deny the petition because the ruling of the Court of Appeals that a district court's denial of a pre-trial motion to dismiss an indictment which omits an essential element of the offense is reversible error is in complete accord with precedent set by this Court, prior decisions of the Court of Appeals, and all decisions of other courts of appeal?

2. If this Court grants the petition, whether it is appropriate for this Court to stay proceedings in this case while it decides *United States v. Resendiz-Ponce,* an appellate decision rendered almost ten months after the panel decision in this case?

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STATEMENT OF THE CASE

The Petitioner (herein the "Prosecution" or "Petitioner") obtained an indictment against Timothy Omer (herein "Omer" or the "Defense") alleging bank fraud in violation of 18 U.S.C. §1344(1). The indictment omitted an essential element of the offense – materiality. Omer filed a timely, pre-trial motion to dismiss the indictment pursuant to Rule 12(b)(3)(B) of the FEDERAL RULES OF CRIMINAL PROCEDURE (herein "F.R.Cr.Pro."). The District Court denied Omer's motion.

Prior to trial, the Defense also moved for a disclosure of the grand jury transcripts. The Prosecution objected. The District Court denied the Defense's motion. As a result, the District Court denied Omer's motion to dismiss the indictment without reviewing grand jury transcripts. A jury convicted Omer at trial. He appealed.

On appeal, Omer asserted that the District Court's denial of his timely, pretrial motion to dismiss the indictment which failed to allege a materially false statement was reversible error. The Prosecution asserted that a materially false statement was not an element and that, even if it was, the error was harmless. After reviewing briefs and hearing oral argument, a three-judge panel of the Court of Appeals held that materiality was an element of federal bank fraud. It also held that the District Court's denial of Omer's timely, pre-trial motion to dismiss was reversible error. The Prosecution petitioned for a rehearing *en banc*. The Court of Appeals denied the Prosecution's petition.

The Petitioner now asks this Court to grant a writ of *certiorari*. It states that the issue here is much broader than that decided by the Court of Appeals. It suggests the

issue is: "Whether, in a federal prosecution, the omission of an element of the offense both from the indictment and from the petit jury's instruction can constitute harmless error." As explained herein, the issue in this case is not whether a defective indictment can ever be the subject of a harmless error analysis, but rather, whether a trial court's denial of a motion to dismiss an indictment which omits an essential element of an offense is reversible error.

A. Statutory Context

18 U.S.C. §1344(1) provides that whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. While the statute does not specifically define the term "scheme or artifice to defraud," in 1999 this Court held that a materiality was an essential element of the federal fraud statutes. *Neder v. United States*, 527 U.S. 1, 25 (1999).

B. Factual Background

The Petitioner has set forth facts not supported by the record. Rather than attempt to address those facts individually, the Defense respectfully suggests the following is a fairer summary of the facts:

Tim Omer is a businessman who resides in Yakima, Washington. He has no prior criminal history and is the father of two minor boys. In early summer of 2001, Ms. Regan Tabor, who was residing in Montana, asked Omer to purchase some electronic products for her in Washington. She told him she was buying the products for a

hospital foundation. Omer was pursuing Tabor romantically at the time. He hoped to marry her.

Tabor, through a series of misrepresentations to Omer, convinced him to engage in floating checks. She sent him checks from Montana to deposit in his account and directed him to send checks from Washington for deposit in her account. At a time late in this arrangement, Omer became aware that the float was as high as $15,000. He confronted Tabor. She insisted her account was short of funds because the hospital foundation was slow in paying her. She assured Omer that this was only a short-term problem.

Unbeknownst to Omer, Tabor was floating hundreds of thousands of dollars of checks between several accounts she controlled in Montana. There was no hospital foundation. She was engaging in an INTERNET marketing scheme. Tabor was also siphoning hundreds of thousands of dollars from her respective accounts. When the float failed and the respective banks closed their accounts, Omer ultimately learned that the banks had lost approximately $256,000.

Omer had received no profit from the check float or from Tabor's business. Throughout the course of his dealings with Tabor, Omer's personal expenditures from his account were less than the monies he deposited from his earnings and money received from his mother. When his account was closed, he not only lost approximately $4,000.00 of his own deposits, but owed his bank $90,000.00 for Tabor's bad checks that his bank had honored.

At trial, Defense Counsel cross-examined the two bank employees who had contact with Omer. Both admitted that statements made by Omer were not material to their decision regarding the maintenance or closing of his account, or honoring the checks drawn on Omer's account.

C. Decision of the Court of Appeals

On appeal, Omer argued that the District Court erred when it denied his timely, pre-trial motion to dismiss. Based on this Court's holding in *Neder*, Omer argued that the indictment was defective because it failed to allege that Omer made any false statement, much less a materially false statement.

Omer based his position on this Court's ruling in *Williams v. United States*, 458 U.S. 279, 290 (1982). In *Williams*, this Court noted that to interpret that a drawer of a check has made a "false statement" whenever he has insufficient funds in his account at the moment the check is presented would render a wide range of unremarkable conduct violative of federal law which is already addressed in a comprehensive fashion by state bad check statutes. *Id.* at 279.

While the Indictment did not allege that Omer made any statements, it did allege that he engaged in writing and depositing checks which, at the time of deposit, he knew lacked sufficient funds in the drawee bank to cover the checks. The Indictment, however, failed to allege that Omer's conduct was material to the banks' losses.

The Court of Appeals stopped short of holding that a materially false "statement" is an essential element of bank fraud. The Court, however, did agree that in *Neder*

this Court held that materiality is an element of federal bank fraud. It also held that the District Court's denial of Omer's timely, pretrial motion to dismiss the indictment, thereby allowing an indictment that did not allege a federal offense to be tried and presented to the petit jury, was reversible error. *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005).

The panel filed its decision on January 19, 2005. The Prosecution petitioned for a rehearing *en banc*. The Prosecution then asked for and obtained a forty-five day extension for filing its petition for rehearing. See attached Appendix "A." The Prosecution then asked for and obtained an additional seven-day extension. See attached Appendix "B."

While the Prosecution's petition for rehearing was pending in this case, the Court of Appeals decided *United States v. Resendiz-Ponce*, 425 F.3d 729 (2005). In that case, the Court of Appeals also held a trial court's denial of a timely, pre-trial motion to dismiss the indictment because the prosecution had failed to include an essential element of the offense in the indictment was reversible error. *Id.* at 733. The Court of Appeals decided *Resendiz-Ponce* nearly ten months after the panel decision in this case. The prosecution did not seek a petition for rehearing in *Resendiz-Ponce*.

The Court of Appeals denied the Prosecution's petition for rehearing in this case on October 31, 2005, twenty days after deciding *Resendiz-Ponce*. The Petitioner then sought and obtained from the Court of Appeals a ninety-day stay of mandate in this case. See attached Appendix "C." The Petitioner then moved to further extend the stay of mandate until February 28, 2006, stating that it would need at

least until that date to prepare its petition in this case "due to the press of other matters." See attached Appendix "D." By February 8, 2006, however, the Petitioner had managed to overcome the press of other matters so as to draft and file its Petition for Writ of *Certiorari* in *Resendiz-Ponce*. The Prosecution then filed its petition in this case on February 28, 2006 requesting a stay of these proceedings pending the outcome in *Resendiz-Ponce*.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in this case adheres to precedent set by this Court, and is in complete accord with other decisions of that Court and other federal appellate court decisions. The Prosecution has been able to complain that the decision of the Court of Appeals conflicts with decisions of this Court and other courts of appeals only because it has incorrectly phrased the issue in this case and relied upon authorities which are factually distinguishable from this case.

The Prosecution has suggested the Court of Appeals was faced with determining whether an indictment which omits an element of an offense can ever constitute harmless error. Certainly, this Court and appellate courts have answered that question in the affirmative. They have done so, however, when the defendant has failed to file a timely motion to dismiss a defective indictment, thereby arguably waiving his right to challenge the indictment at all, or when the indictment failed to allege a sentencing factor and the reviewing courts were able to determine that the grand jury was, in fact, presented with the evidence of the sentencing factor when it returned the indictment.

Rather than treat a delay in objecting to the sufficiency of an indictment as a waiver, however, this Court and most federal circuit courts, instead, have applied a "plain error" analysis. In doing so, this Court and the federal circuit courts have looked at the entire evidentiary record at the time the challenge was made. If the record reflected that the prosecution had proved, or the defendant had admitted, the existence of the omitted element prior to the challenge, courts have held the error in the indictment to be harmless. This Court and lower courts have reversed only upon finding that the defendant had proven that the error somehow prejudiced the defendant.

The real question here, however, is whether the trial court's denial of Omer's timely, pretrial motion to dismiss an indictment which omitted an essential element of the offense was reversible error. In this case, the Court of Appeals answered that question by saying: "Yes." In doing so, the decision of the Court of Appeals is in complete accord with this Court's decisions, longtime precedent of the Court of Appeals, and all other circuit court decisions. In short, the Prosecution's assertion that this decision created a conflict with decisions of this Court and those of other circuits is without merit. Accordingly, the Defense respectfully asks this Court to deny the Prosecution's petition.

Finally, if this Court were to grant the Prosecution's petition, the Prosecution has asked that this case be held in abeyance pending the outcome of another case, a panel decision filed ten months after the panel decision in this case. The Prosecution's request smacks of chronological forum shopping and relies upon no authority. Accordingly, the Defense respectfully asks this Court to deny the

Prosecution's request to hold these proceedings in abeyance if this Court were to grant the Prosecution's petition.

REASONS TO DENY THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE ACCORD WITH PRECEDENT SET BY THIS COURT, PRIOR DECISIONS OF THE COURT OF APPEALS, AND ALL DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

Rule 10 of the RULES OF THE SUPREME COURT OF THE UNITED STATES makes it clear that review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 recognizes that a decision which conflicts with precedent set by this Court or which conflicts with other circuit opinions may justify granting a petition for writ of certiorari. As explained below, however, the Petitioner's complaint that the decision of the Court of Appeals in this case has created a conflict is not well founded. Accordingly, the Prosecution's petition should be denied.

A. THE PANEL'S DECISION FOLLOWS THE PRECEDENT SET BY THIS COURT.

At common law the valuable function of the grand jury was to stand between the prosecutor and the accused and to determine whether the charge was filed upon credible testimony. *Hail v. Hinkel*, 201 U.S. 43, 59 (1906). This Court has held that the Fifth Amendment to the United States Constitution guarantees that no citizen may be accused of a federal felony and held for trial unless

indicted by a grand jury. As early as the late nineteenth century, this Court recognized that an indictment which fails to recite an essential element of an offense is fatally defective. *United States v. Carll*, 105 U.S. 611, 613 (1881). "Incorporated into the Fifth Amendment by the Founders, there is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956). In *Russell v. United States*, 369 U.S. 749 (1962) this Court noted that the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury was first intervened reflects centuries of antecedent development of common law. *Id.* at 761.

In *Russell*, the prosecution failed to allege an essential element of an offense. The defendants made proper, timely motions to quash the indictment. *Id.* at 753. This Court reversed the convictions, writing: "The very purposes of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." (Citing *Stirone v. United States*, 361 U.S. 212 (1960)). *Russell* at 1051.

In *Stirone* the prosecution alleged one offense in the indictment and proved a different offense at trial. *Stirone*, 361 U.S. at 214. The defendant made proper, timely objections when the trial court allowed the evidence, and timely challenged the court's instruction that the jury could convict on this evidence. *Id.* This Court determined that the trial court had effectively amended the indictment. *Id.* at 215. This Court went on to reverse the conviction because it was not based upon an indictment brought by a grand jury although the petit jury had found beyond a reasonable doubt that the defendant had committed a

separate, unindicted federal offense. *Id.* at 219. This Court based its decision on the fact that "we cannot know whether the grand jury would have included in its indictment a charge" [different from the one found in the indictment]. *Id.*

In 1999, this Court held that materiality is an element of federal bank fraud. *Neder v. United States*, 527 U.S. 1, 20, 25 (1999). The Petitioner has conceded that premise. Nevertheless, years later the Prosecution obtained a grand jury indictment against Omer which omitted this element. Omer made a timely, pre-trial motion to dismiss the defective indictment. The District Court denied the motion.

Following this Court's precedent recited above, the Court of Appeals correctly held that the trial court's ruling constituted error. Then, in accord with this Court's ruling in *Chapman v. California*, 386 U.S. 18 (1967) the Court of Appeals determined the error was not subject to harmless error analysis. It was reversible error.

In *Chapman* this Court recognized that sometimes error can be harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* at 24. Of course, when the error is the district court's refusal to dismiss an indictment when it is not known whether evidence regarding an essential element of an offense has been presented to the grand jury, that error will always contribute to the verdict. If the court had not committed the error, the indictment would have been properly dismissed. There would have been no guilty verdict. Accordingly, a district court's denial of a pre-trial motion to dismiss an indictment when the court is unable to determine whether the grand jury considered evidence

regarding an essential element of the offense will never be subject to a *Chapman* analysis because it will always contribute to the jury's finding of guilt.

The Prosecution argues that this Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002) has somehow called into question more than a century of this Court's decisions. The Defense respectfully suggests the *Cotton* decision applies to this case only to the extent that it confirms that a citizen's Fifth Amendment grand jury right may be waived if not timely invoked prior to trial.

In *Cotton*, unlike here, the defendant failed to object to the sufficiency of the indictment prior to trial or even on the district court level. *Id.* at 628. While on appeal, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Based upon that decision, Cotton asked the appellate court to reverse his enhanced sentence because the drug amount used to impose that sentence was not alleged in the indictment. *Id.* at 629. The Fourth Circuit did so and the prosecution petitioned for a writ of *certiorari*. This Court reversed, holding that while the trial court may have erred, the standard of review was one of "plain error" because the defendant had not raised the issue prior to trial. This Court then determined that the defective indictment did not rise to the level of plain error.

Cotton is distinguishable from this case for two reasons: (1) the defendant attacked the validity of the indictment only on appeal; and (2) the alleged deficiency in the indictment was the failure to allege a sentencing factor.

First, this Court recognized that an accused can waive his grand jury right. *Id.* at 630, citing *Smith v. United*

States, 360 U.S. 1, 6 (1959). This Court went on to note that Cotton had, indeed, made such a waiver by failing to make a timely assertion of that right. *Id.* at 634, citing *Yakus v. United States*, 321 U.S. 414, 444 (1944). This Court pointed out this critical distinction between its ruling in *Cotton* and previous cases in which a harmless error approach regarding that validity of the indictment was rejected because the defendant had made a timely objection to the charge. *Id.* at 631.

Here, Omer, like the defendants in *Stirone* and *Russell*, made a proper, timely objection to the validity of the charge that was ultimately presented to the petit jury. He did not, like Cotton, waive his fundamental right to have his fellow citizens review the prosecutorial function by failing to object to the sufficiency of the indictment prior to trial.

Second, this Court noted that the alleged defect in Cotton's indictment pertained to a sentencing enhancement factor. *Id.* at 633. Even if Cotton had attacked the indictment prior to trial, he would not have prevailed. The indictment did, in fact, allege a federal offense. The indictment was deficient only in that it failed to allege the drug amounts for which Cotton was ultimately held accountable at sentencing. The indictment's mere failure to allege a specific amount of controlled substance did not, in and of itself, mean that the grand jury had failed to charge an indictable offense.

The Petitioner also suggests that this Court's decision regarding harmless error in *Neder v. United States, supra*, impacts this case. It does not. In *Neder*, the trial court had instructed the jury that it need not decide whether Neder's false statements were material. *Id.* at 6. This Court held

that, while the jury instruction was error, it was not structural error and was, therefore, subject to a harmless error review. Upon reviewing the trial transcript this Court determined the error was harmless because the prosecution had produced ample evidence at trial that Neder's conduct was material to the fraud and upheld the conviction. *Id.* at 16

This Court's ruling in *Neder*, that a district court's refusal to instruct a petit jury on an element of an offense is not a structural error, is inapplicable to a trial court's denial of a motion to dismiss a grand jury indictment which does not recite an essential element of the offense. As explained herein, this Court and every federal appellate court that has addressed this issue have so held.

Finally, the Prosecution relies on this Court's ruling in *United States v. Mechanik*, 474 U.S. 66, (1986) to suggest that an irregularity in grand jury proceedings can be subject to a harmless error analysis. In *Mechanik*, this Court upheld a conviction even though the defense complained that two witnesses were in the grand jury room at the same time. *Id.* at 73. The Defense respectfully points out, however, that prior to this Court's decision in *Mechanik* this Court found two grand jury errors to be structural – racial discrimination in the selection of grand jurors, *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986), and sex discrimination in the selection of grand jurors, *Ballard v. United States*, 329 U.S. 187, 195-96 (1946).

As discussed herein, the United States Constitution not only protects citizens against racial and sex discrimination, but also criminal accusations based on facts not presented to a grand jury. That document does not, however, guaranty how many witnesses may be in the grand

jury room at one time. It is also important to note that in *Mechanik*, as was the case in every other opinion relied upon by the Prosecution, the defendant did not complain of the irregularity until the matter was on appeal. *Id.* at 70-71.

B. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH ALL OTHER DECISIONS OF THAT COURT.

The decision of the Court of Appeals in this case is consistent with all other decisions of that Court. In *Du Bo*, the Court's landmark case on this issue, the Court held that "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment. *Id.* at 1180. The Court of Appeals went on to hold that unlike the instance in which a trial jury has failed to make a finding with respect to an element of the offense, the grand jury's failure to do so is reversible error and cannot be cured by a finding of an appellate court that said the error was harmless. *Id.* In doing so, the Court of Appeals rejected the argument proffered here by the Prosecution that the Supreme Court's application of the harmless error analysis to a faulty petit jury instruction should be extended to a trial court's refusal to dismiss a defective indictment. After *Du Bo*, the Court of Appeals, in *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001) and *Summerland v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) recognized and affirmed that a constitutionally deficient indictment is a structural defect requiring the reversal because the

indictment fails to insure that the Defendant was prosecuted only on the basis of facts presented to the grand jury.

Prior to *Du Bo*, as early as 1979 the Court of Appeals reversed a homicide conviction finding that the failure of an indictment to detail each element of the charged offense constitutes a fatal defect. *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *see also, United States v. King*, 587 F.2d 956, 963 (9th Cir. 1978); *United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976). In *Keith* the Court of Appeals recognized the failure of the indictment to charge essential elements could not be cured by trial court amendment or through jury instructions. The court wrote that the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. In doing so, the Court cited this Court when it wrote in *Russell* that "to allow a prosecutor or court to subsequently guess as to what was in the minds of the grand jury at the time that they returned the indictment would deprive the defendant of a basic protection that the Grand Jury was designed to secure." *Russell*, 369 U.S. at 770.

The Petitioner has failed to grasp the reasoning of the Court of Appeals in *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999) and its prior case law. In *Du Bo*, the court recognized that usually grand jury proceedings are secret and the evidence presented to a grand jury is not available for review by a district or appellate court. Accordingly, if the grand jury does not make a finding as to an essential element of an offense, a reviewing court, unless the grand jury transcripts were disclosed, would need to guess as to what the grand jury was thinking. The Court of Appeals iterated this Court's reasoning in *Russell* that it would be

inappropriate to allow an appellate court to guess as to what was in the minds of the grand jury at the time they returned the indictment. *Id.* at 1180. Accordingly, a trial court's denial of a valid pre-trial motion based on the failure to allege an element of the offense is reversible error. *Id.*

In short, the decision of the Court of Appeals is in accord with that circuit's prior decisions.

C. THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE ACCORD WITH OTHER CIRCUIT COURT OPINIONS.

Nine of the eleven other circuits have addressed whether a denial of a timely motion to dismiss a defective indictment is reversible error when grand jury transcripts are not available. Some of those decisions are in the context of indictments that were defective when brought and some are in the context of indictments that became defective when the trial court amended the indictment from a charge other than that found by the grand jury. All nine circuits have unanimously concurred with the decision below, although some circuits have gone beyond the ruling of the Court of Appeals by holding that a defective indictment is reversible error no matter when the objection is raised.

The cases are as follows:

In *United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) the D.C. Circuit reversed and dismissed an indictment when the trial court erroneously denied a pre-trial motion to dismiss the indictment that omitted an element of the offense.

In *United States v. Van Tran*, 234 F.3d 798, 809 (2d Cir. 2000) the Second Circuit reversed a conviction where the defendants were charged and pled guilty to a simple firearms offense, but were sentenced as if they possessed a sawed-off shotgun even though they did not raise the issue until appeal. The court stated:

> In sum, unless the right to be charged by an indictment containing all of the material elements of an offense is voluntarily, intelligently, and knowingly waived by the defendant, the indictment as returned limits the scope of the district court's jurisdiction to the offense charged in the indictment. If the district court acts beyond its jurisdiction by trying, accepting a guilty plea from, convicting, or sentencing a defendant for an offense not charged in the indictment, this Court must notice such error . . .

Id.

In *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) the Third Circuit reversed a conviction even though the sufficiency of the indictment was not challenged until after guilty plea on appeal. The Court wrote: "Happily, the rule that the indictment, to be sufficient, must contain all the elements of a crime . . . is still a vital part of our Federal criminal jurisprudence." *Id.*

In *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1998) the Fourth Circuit recognized the Fifth Amendment requires that a defendant be convicted only on charges considered and filed by the Grand Jury. In *United States v. Spruill*, 118 F.3d 221 (4th Cir. 1997) the prosecution alleged the defendant had made threats but failed to allege an essential element of the offense – that the threats concerned fire or explosives. The court reversed the

conviction although the defendant had not raised the issue pre-trial, holding that omission of an essential element of the offense is not subject to a harmless error analysis whenever the issue is raised. *Id.* at 227. Also, in *United States v. Pupo*, 831 F.2d 1245 (4th Cir. 1988), the court held that when an indictment fails to include an essential element of the offense charged, it thereby fails to charge any federal offense and a conviction under the indictment may not stand, provided the omission is timely raised. *Id.* at 1239.

In *United States v. Nunez*, 180 F.3d 227, 230-31 (5th Cir. 1999), the prosecution charged the defendant with resisting arrest by assaulting a federal officer with a firearm. At trial, the prosecution proved only an alternative method of the assault. The Fifth Circuit reversed holding that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him, citing *Stirone v. United States*, 361 U.S. 212, 215-16 (1960).

In *United States v. Ford*, 872 F.2d 1231 (6th Cir. 1989), the prosecution charged a firearms infraction on a specific date, but successfully convinced the court to instruct the jury that it could convict if the prosecution proved the possession on any date. The Sixth Circuit recognized the trial court only had jurisdiction to try the defendant on the offense charged by the grand jury and reversed stating "the defendant may have been convicted of an offense other than that charged in the indictment." *Id.* at 1235.

In *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) the prosecution charged the defendant with knowingly carrying and using a Mossberg rifle. At trial the

prosecution presented evidence regarding three rifles. The Seventh Circuit instructed the jury that it could convict if it found that the defendant had used and carried any of the three guns. Recognizing that a court cannot permit a defendant to be tried on charges that are not contained in the indictment against him, the circuit court reversed. *Id.* at 377. In *United States v. Yeo*, 739 F.2d 385, 386-87 (8th Cir. 1984), the Eighth Circuit reversed a conviction after the trial court amended the indictment to include persons other than that named in the indictment. The court, in a later case, recognized that a constructive amendment, which is reversible error *per se*, occurs when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them. *United States v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999).

In *United States v. Keller*, 916 F.2d 628, 634, 636 (11th Cir. 1990), the Eleventh Circuit held that a trial court's jury instructions constituted a constructive amendment of the indictment and therefore violated Keller's Fifth Amendment right to be charged by grand jury indictment, holding that such a violation is reversible error *per se*.

In summary, all federal courts that have addressed this issue have ruled that a judge's denial of a timely motion to dismiss a defective indictment when a transcript of the grand jury proceedings is not available for review is structural and the court's error is subject to automatic reversal. Additionally, all federal courts have agreed that a judge's amendment of an indictment in the same context creates a *scenario* in which a defendant is tried on a charge not brought by a grand jury. Such an amendment is also grounds for automatic reversal.

In support of its position that the decision below conflicts with decisions of other circuits, the Prosecution erroneously relies, either in its petition in this case or in its petition in *Resendiz-Ponce*, on a series of cases from six circuits which denied an attack on the indictment after reviewing for harmless error. All but one of those cases address the validity of an indictment that has been challenged for the first time after conviction or on appeal. Many of the cases alleged sentencing factor error under *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) or *Ring v. Arizona*, 536 U.S. 584, 609 (2002), or both. The decision below conflicts with none of those decisions.

In *United States v. Corporan-Cuevas*, 244 F.3d 199, 203 (1st Cir. 2001) the defendant challenged the indictment for the first time on appeal after entering a plea of guilty. During his guilty plea he admitted the omitted element of the offense. The First Circuit Court upheld the conviction. *Id.* 203. In *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000), that court again upheld the conviction when the defendant challenged the indictment's failure to allege an element of the offense for the first time at sentencing and the attack was based upon a sufficiency of the evidence argument. *Id.* at 308.

In *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003) the defendant made a *Ring* challenge to the indictment for first time on appeal. The Fourth Circuit held that petit jury's finding of all the aggravating factors beyond a reasonable doubt demonstrated that Higgs was not prejudiced by the lack of an independent judgment of the grand jury. *Id.* at 306.

In *United States v. Robinson*, 367 F.3d 278, 289 (5th Cir. 2004) the Fifth Circuit also upheld a conviction when

the defendant made a *Ring* challenge to the indictment for the first time on appeal for failure to charge aggravating factors.

In *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002), the Sixth Circuit upheld a conviction when the defendant challenged the indictment's omission of an element of the offense for the first time on appeal.

In *United States v. Trennell*, 290 F.3d 881, 885 (7th Cir. 2002), the Seventh Circuit also denied a late *Ring* challenge to the indictment. Trenell's counsel not only failed to object to the deficiency in the indictment prior to trial, but did not object to proceeding to trial without a change in the indictment. Trennell did not object to the inclusion of the specific drug amounts on the proposed verdict form or jury instructions. *Id.* Only after trial did the defense file a motion challenging the verdict form which allowed the jury to find Trenell responsible for a specific quantity of cocaine. *Id.*

In *United States v. Prentiss*, 256 F.3d 971, 982-83 (10th Cir. 2001), the Tenth Circuit noted that the defendant failed to object to the sufficiency of the indictment or even request a bill of particulars at the district court level. The court upheld the conviction, but specifically cited *Du Bo*, noting that the facts in *Prentiss* were critically different because Du Bo had made a pre-trial challenge of the indictment. *Id.* at 993.

The one case upon which the Prosecution relies in which the defendant challenged the indictment prior to trial is *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005). *Allen*, unlike here, involved a *Ring* challenge for failure to include an aggravating factor in a death sentence case.

The Court of Appeals, 247 F.3d 741, affirmed the conviction. Granting *certiorari*, this Court, 536 U.S. 953, vacated and remanded for reconsideration. On reconsideration, the Court of Appeals, 357 F.3d 745, vacated the death sentence and remanded for re-sentencing. The prosecution petitioned for rehearing *en banc*.

On rehearing the Eighth Circuit ruled the trial court's denial of the defendant's motion to dismiss was harmless because both the district court and the appellate court had the rare opportunity to review the grand jury transcripts in making that determination. *Allen*, 406 U.S. at 947-48. Upon reviewing those transcripts, the Appellate Court determined that any rational grand juror would have found the existence of the requisite aggravating factors. *Id.* at 948.

The *Allen* decision, then, has no application to and is in complete accord with the decision of the Court of Appeals in this case for two reasons. First, in *Allen* the District Court and Court of Appeals were able to inspect the grand jury transcript in order to insure that the defendant was tried on the basis of facts presented to the grand jury. This alleviated the constitutional infirmity noted by the Court of Appeals in *Du Bo* and this Court in *Russell, supra*, where the grand jury transcripts were not part of the record and the court, therefore, was not able to review them to insure that the defendant was "tried on the basis of facts presented to the grand jury." *Du Bo*, 186 F.3d at 1180; *Russell*, 369 U.S. at 753. Accordingly, in *Allen* the reviewing court was not impermissibly placed in the position of guessing what evidence was presented to the grand jury. *Id.* Instead, it was able to review the grand jury transcripts to determine whether the district court erred when it denied the defendant's motion to dismiss.

Second, unlike here, *Allen* involved a *Ring* challenge to the omission of a sentencing factor. As was the case in *Cotton*, even if Allen had attacked the indictment prior to trial, he would not have prevailed. The indictment did, in fact, allege a federal offense. The indictment was deficient only in that it failed to allege the aggravating factor for which Allen was ultimately held accountable at sentencing. The mere fact that the indictment did not allege those factors did not, in and of itself, deprive a federal court of jurisdiction over the case.

As noted above, in *Chapman* this Court determined that a district court's error is "harmless" only if the prosecution can prove to an appellate court's satisfaction, beyond any reasonable doubt, that the district court's erroneous ruling did not contribute to the defendant's conviction. 386 U.S. at 24. Here, the Court of Appeals has made an unchallenged determination that the District Court erred. If the District Court had not erred, it would have granted the Defense's motion to dismiss. If the motion had been granted, there would have been no trial. Had there been no trial, Omer would not have been convicted. This means the District Court's error contributed to Omer's conviction. Accordingly the District Court's error was not and could not be harmless.

In *Du Bo*, when the Court of Appeals wrote that such an error "cannot be cured by finding of an appellate court that said the error was harmless," 186 F.3d at 1180, the Court was not expressing an arbitrary restriction on an appellate court, it was stating a logical conclusion to a syllogism: If A is harmless only when it does not contribute to B; and A always contributes to B; then A is never harmless.

Accordingly, the Prosecution's petition, like the indictment it brought against Omer, is fatally defective.

REASONS TO DENY THE PROSECUTION'S REQUEST TO STAY THESE PROCEEDINGS IF THIS COURT GRANTS THE PROSECUTION'S PETITION

Petitioner further asks this Court to hold its petition here in abeyance pending disposition of *United States v. Resendiz-Ponce,* No. 05-998. Petitioner argues that the Question Presented here is broader than that presented in a petition already filed in *Resendiz-Ponce.* Petitioner's premise is flawed.

The issue here concerns a timely motion to dismiss a flawed indictment and a trial that perpetuated that flaw, because evidence of the missing element was *never* supplied. The issue is not broader; instead, the circumstances that obtain in this case are significantly worse for Petitioner's argument that the error in failing to dismiss a flawed indictment is subject to harmless error analysis. Indeed, as argued above, the unanimity of opinion with regard to the nature of the error here indicates that this Petition should be denied, regardless of the Court's decision in *Resendiz-Ponce.*

Further, the Court should not countenance Petitioner's case-shopping. While acknowledging the solemnity of Petitioner's duties, gamesmanship does not serve the interests of justice for any party. The panel below issued its decision in this case on January 12, 2005. Petitioner delayed the decision of the Court of Appeals on its petition for rehearing *en banc* by requesting two extensions for

time to file. Petitioner further delayed by requesting and obtaining two stays of mandate from the Court of Appeals under the guise of needing additional time for preparation and approval of this petition. In the meantime, Petitioner was able to complete a petition in *Resendiz-Ponce* to ensure its priority. If this Court determines that the lower Court's decision in that case warrants review, that should not also include sanction of Petitioner's effort to effect retroactive application of any decision from that case.

CONCLUSION

Omer respectfully requests this Court to deny the petition because the decision of the Court of Appeals comports with precedent set by this Court and is entirely consistent with all circuit court decisions.

If this Court grants the petition, for the reasons set forth above Omer respectfully asks this Court to refrain from placing this case in abeyance pending the outcome of another case and respectfully asks this Court, instead, to consolidate the cases.

Respectfully submitted,

MICHAEL J. SHERWOOD
MICHAEL J. SHERWOOD, P.C.
401 N. Washington
Missoula, Montana 59802
(406) 721-2729

APPENDIX "A"

KRIS A. MCLEAN
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee/ Cross-Appellant,** **vs.** **TIMOTHY OMER,** **Defendant-Appellee Cross-Appellee.**	**CA 03-30544** **CA 03-30513** **District Court Number: CR 03-09-M-DWM** **MOTION FOR EXTENSION OF TIME**

Comes now the United States of America by and through Kris A. McLean, Assistant United States Attorney for the District of Montana and pursuant to Circuit Rule 31-2.2(b) respectfully requests this Court grant an extension of time of 45 days in which to file its Petition for Rehearing or for Rehearing En Banc in the above captioned matter. The government's petition for re-hearing is

currently due on February 2, 2005. Government counsel is making this request on the grounds and for the reason that the United States Department of Justice requires additional time to analyze the issues and make its recommendation to the Solicitor General of the United States concerning the government's rehearing request in this case. Government counsel has exercised due diligence and advises the court that the government's petition for rehearing will be filed within the time requested.

The defendant-appellant is not in custody at this time.

Government counsel has contacted appellant's counsel who advises that he has no objection to this continuance.

WHEREFORE the United States respectfully requests an extension of 45 days in which to file its Petition for Rehearing or for Rehearing En Banc.

DATED this 24th day of January, 2005.

WILLIAM W. MERCER
United States Attorney

/s/ Kris A. McLean
KRIS A. MCLEAN
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee in the Office of the United States Attorney and is a person of such age and discretion as to be competent to serve papers.

That on 1-24-05 she served a copy of the attached **MOTION FOR EXTENSION OF TIME** by placing said copy in a postpaid envelope addressed to the person(s)

hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Missoula, Montana.

Addressee(s):
Michael J. Sherwood
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

/s/ Sheryl L. Nordahl
Sheryl L. Nordahl
Paralegal Specialist

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/ Cross-Appellant, v. TIMOTHY W. OMER, Defendant-Appellee.	)	Nos. 03-30513 & 03-30544

GOVERNMENT'S MOTION FOR FURTHER EXTENSION OF TIME TO SEEK REHEARING EN BANC

Pursuant to Rules 26 and 27 of the Federal Rules of Appellate Procedure, the United States respectfully requests that the Court extend the period of time in which the government may file a petition for rehearing en banc in this case by 7 days, from March 11, 2005 to March 18, 2005. In support, the government states the following:

1. On January 19, 2005, this Court issued a published per curiam opinion reversing defendant Omer's conviction for bank fraud, holding that the indictment's failure to include an explicit allegation that the scheme to defraud was "material" constituted a "fatal flaw requiring dismissal of the indictment." 395 F.3d 1087, 1089.

On February 1, 2005, this Court granted the government's motion extending the time for filing a petition for rehearing en banc to March 11, 2005.

2. The government may not file a petition for rehearing en banc without the authorization of the Solicitor General (SG). Due to the general press of a wide range of matters, including, most notably, issues involving the implementation of *United States v. Booker*, 125 S. Ct. 738 (2005), the SG's Office has not yet made a final determination as to the propriety of seeking rehearing en banc in this case. In fact, the Deputy Solicitor General who oversees criminal-law matters is himself presenting an oral argument before the en banc Eighth Circuit in *United States v. Pirani*, No. 03-2871, a Booker-related matter scheduled for argument on March 9, 2005. We believe that a brief further extension of 7 days should be sufficient to allow for a more complete and informed decision, and, if authorized, for the preparation of the petition.

3. This motion is made in good faith (after consultation with counsel's supervisors) and not for purposes of delay.

4. Defendant is not in custody, and therefore, is not likely to be prejudiced by this request.

5. Counsel for the defendant was contacted concerning this request but no response had been received by the time this motion was filed.

WHEREFORE, the United States respectfully requests that the Court extend the time in which the government may seek rehearing en banc to March 18, 2005.

Dated: March 7, 2005

Respectfully submitted,

WILLIAM W MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
District of Montana

By: /s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, NW
Room 1264
Washington, D.C. 20530
Tel: (202) 514-3308

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of March 2005, I caused to be served the foregoing Government's Motion for Further Extension of Time To File Petition for Rehearing En Banc by causing a true and correct copy thereof to be deposited in the U.S. mail, postage prepaid, and addressed as follows:

Michael J. Sherwood, Esq.
Attorney at Law
P.O. Box 8358
Missoula, MT 69807
Counsel for Defendant-Appellee

/s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney for the United States

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. TIMOTHY W. OMER, Defendant-Appellant	)	No. 03-30513

UNITED STATES OF AMERICA Appellant v. TIMOTHY W. OMER, Defendant-Appellee.	)	No. 03-30544

MOTION TO STAY THE MANDATE

Pursuant to Fed. R. App. P. 41(d)(2) and 9th Cir. R. 41-1, the United States of America respectfully requests that the Court stay the mandate for 90 days so that the Solicitor General may decide whether to file a petition for a writ of certiorari in this case. As set forth below, a certiorari petition "would present a substantial question and * * * there is good cause for a stay." Fed. R. App. P. 41(d)(2).

STATEMENT

1. This is a defense appeal from a judgment of conviction and sentence in a criminal case. In June 2001, Omer and co-defendant Regan Tabor embarked on a check kiting scheme by depositing "not sufficient funds" (NSF)

checks into various bank accounts and drawing further checks against the artificially inflated balances. To conceal their actions, they took advantage of a check float – i.e., a short period of time that passes before a deposited check is processed and presented for payment from the account on which the check is drawn – and fraudulently obtained large sums of cash from four different financial institutions even though the accounts contained insufficient funds.

A federal grand jury in the District of Montana returned a five-count indictment against Omer and Tabor. Count 1, the only count against Omer, charged him and Tabor with "knowingly execut[ing] or attempt[ing] to execute a scheme or artifice to defraud" four specific "financial institutions" between June 25, 2001 and October 5, 2001, by kiting checks between six bank accounts, all in violation of 18 U.S.C. 1344(1). Indictment, Count 1.[1]

2. Defendant filed a pretrial motion to dismiss the indictment, arguing that "[t]he Fifth Amendment requires that a defendant be convicted only on charges considered and found by a Grand Jury." Mot. to Dismiss (6/1/03) 12. Citing *Neder* v. *United States*, 527 U.S. 1 (1999), he argued that the indictment was deficient because it failed to allege, explicitly, that the scheme was "material" to defrauding the banks, and that the financial institutions

[1] The federal bank fraud statute makes it a crime to "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice * * * to defraud a financial institution." 18 U.S.C. 1344(1). Subsection (2) of that statute makes it a crime to obtain money or assets from a financial institution "by means of false or fraudulent pretenses, representations, or promises." Subsection (2) was not charged in this case, and thus is not at issue. Cf. *United States* v. *McNeil*, 320 F.3d 1034, 1037 (9th Cir. 2003) ("The scope of [Section 1344(1) and Section 1344(2)] differs substantially.").

were federally insured. The district court denied the motion, and the case went to trial. At the close of the government's case, defendant moved for a judgment of acquittal, arguing that the government failed to present any evidence that he made a false or misleading statement, much less a material one. The district court denied the motion, as well as defendant's request for a jury instruction requiring the jury to find that he had made a materially false statement. Instead, the district court instructed the jury that, to find defendant guilty of bank fraud, the jury must find, inter alia, that he "knowingly executed a scheme or artifice to defraud the financial institutions [listed in Count 1]"; that he "did so with the intent to defraud"; and that the financial institutions were federally insured or otherwise chartered by the United States. Jury Instr. No. 22. The court further instructed that "[t]he phrase 'any scheme or artifice to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value." Jury Instr. No. 25. The jury convicted defendant on Count 1. The district court sentenced defendant to five months in prison, but stayed execution of the sentence pending appeal.

3. This Court reversed defendant's conviction, agreeing with him that the indictment was fatally deficient because it failed to explicitly allege the materiality of the scheme. *United States* v. *Omer*, 395 F.3d 1087 (9th Cir. 2005) (per curiam). The panel noted that in *Neder, supra*, the Supreme Court held that the term "defraud" used in Section 1344(1) (as well as the analogous mail- and wire-fraud statutes) evidenced Congress's intent to retain that term's well-accepted meaning, which, at common law,

included a "materiality" component. *Id.* at 1088-1089. The panel also explained that it is the scheme or artifice itself, rather than any specific statement or omission, that must be material. *Id.* at 1089. Applying these principles, the panel concluded that defendant's indictment was deficient because it did not "recite" that the scheme or artifice alleged was "material." *Id.*

With respect to the remedy, the panel, following *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), held this omission was not amenable to harmless-error analysis, but instead was governed by the *Du Bo* rule that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is * * * a fatal flaw requiring dismissal of the indictment" 395 F.3d at 1088 (quoting *Du Bo*); *id.* at 1089 (reversing conviction pursuant to this rule).

4. The Solicitor General authorized the government to seek rehearing en banc of that portion of the panel decision holding (in accordance with *Du Bo*) that indictment omissions were not amenable to harmless-error analysis. On October 31, 2005, this Court denied the government's petition, over the published dissent of six judges. See *United States* v. *Omer*, ___ F.3d ___, 2005 WL 2842078 (9th Cir. Oct. 31, 2005) (Graber, J., dissenting, joined by Kozinski, O'Scannlain, Bybee, Callahan, and Bea, JJ.).

ARGUMENT

A party may "move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court," and such a stay should be granted if "the certiorari petition would present a substantial question and that

there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). The stay "must not exceed 90 days," unless, inter alia, the party seeking the stay files a certiorari petition and notifies the clerk within the period of the stay, in which case the stay "continues until the Supreme Court's final disposition." Fed. R. App. P. 41(d)(2)(B). Consistent with these principles, this Court should stay the issuance of its mandate in this case for 90 days to afford the Solicitor General an adequate opportunity to consider whether to seek Supreme Court review of the decision in this case.

1. A certiorari petition is due for filing in the United States Supreme Court without an extension within 90 days of the order denying rehearing (in this case, Monday, January 30, 2006). See 28 U.S.C. 2101(c); S. Ct. R. 13.1.

2. As the dissent from the order denying rehearing en banc makes clear, this case presents a substantial issue for possible Supreme Court review: whether the omission of an essential allegation from a criminal indictment is amenable to harmless-error review. This question is important, not only because of its recurring significance, but also because this Court's resolution of that question in *Du Bo* is (1) in serious tension with extant Supreme Court precedent, (2) rests on premises that are questionable at best, and (3) conflicts with the decisions of other courts of appeals applying harmless-error analysis to similar indictment defects.

3. The decision whether to seek certiorari rests with the Solicitor General. 28 C.F.R. 0.20(b). In this case, the Solicitor General has already authorized the filing of the government's petition for rehearing en banc. Accordingly, he will carefully consider whether to file a certiorari petition in the Supreme Court. Before he makes that

decision, however, he must receive written recommendations from the United States Attorney, the Assistant Attorney General for the Criminal Division, an Assistant to the Solicitor General, and the Deputy Solicitor General for criminal matters. The process of preparing those memoranda has only just begun.

4. A stay of the mandate is needed to ensure that the Solicitor General has the time required to make a fully informed decision on whether to pursue Supreme Court review, and to prepare and file a petition, if he elects to file one. A stay of the mandate will also ensure that the case does not return to the district court where proceedings could resume before the Solicitor General makes a final determination.

5. The defendant will not be prejudiced by a stay of the mandate. The Solicitor General may seek review of the Court's decision in the Supreme Court whether or not the mandate issues. Staying the mandate merely operates to defer any further proceedings in the district court until Supreme Court review is completed; it does not affect either the time for filing a certiorari petition or the power of the Court to grant a petition if one is filed. *Clay* v. *United States*, 537 U.S. 522, 527 (2003); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983). And, as noted, the district court stayed the execution of the defendant's sentence pending appeal, so, barring a violation of the conditions of his release, he will remain out of custody until this case is finally resolved.

6. In the event the Solicitor General decides not to seek Supreme Court review, the government will notify the Court and counsel immediately, and the mandate can issue forthwith.

7. Michael Sherwood, counsel for the defendant, has advised me that he opposes this request.

WHEREFORE, the Court should grant the government's Motion to Stay the Mandate for 90 Days.

Respectfully submitted,

WILLIAM W. MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
District of Montana

By /s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney, United States
Department of Justice
Criminal Division, Appellate
Section
950 Pennsylvania Avenue NW
Room 1264
Washington, D.C. 20530
(202) 514-3308
michael.rotker@usdoj.gov

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing motion has been sent this 1st day of November 2005, by first class mail, postage prepaid, to:

Michael J. Sherwood, Esq.
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

/s/ Michael A. Rotker
MICHAEL A. ROTKER
Counsel of Record for the
United States

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. TIMOTHY W. OMER, Defendant-Appellant	)	No. 03-30513

UNITED STATES OF AMERICA Appellant v. TIMOTHY W. OMER, Defendant-Appellee	)	No. 03-30544

MOTION TO FURTHER EXTEND THE STAY OF THE MANDATE FOR GOOD CAUSE

Pursuant to Fed. R. App. P. 41(d)(2)(B) and 9th Cir. R. 41-1, the United States of America respectfully seeks a further extension of the mandate in this case "for good cause" shown.

STATEMENT

1. This case presents the question whether the omission of an essential allegation from a criminal indictment is automatically reversible without regard to possible prejudice. Following circuit precedent, the three judge panel in this case so held. See *United States* v. *Omer*, 395 F.3d 1087, 1088-1089 (9th Cir. 2005) (per curiam) (applying

the rule of *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is * * * a fatal flaw requiring dismissal of the indictment").

2. The Solicitor General authorized the government to seek rehearing en banc of that portion of the panel decision holding (in accordance with *Du Bo*) that indictment omissions are not amenable to harmless-error analysis. On October 31, 2005, this Court, over the published dissent of six judges, denied the government's petition. See *United States* v. *Omer*, ___ F.3d ___, 2005 WL 2842078 (9th Cir. Oct. 31, 2005) (Graber, J., dissenting, joined by Kozinski, O'Scannlain, Bybee, Callahan, and Bea, JJ.).

3. On November 1, 2005, the government sought a stay of the mandate for 90 days pending the Solicitor General's determination whether to seek certiorari review of the *Du Bo* automatic-reversal rule. On November 9, 2005, Judge Thomas granted the government's motion and stayed issuance of the mandate for 90 days (i.e., to February 7, 2006).

4. On January 24, 2006, the Solicitor General authorized the filing of a petition for a writ of certiorari in *United States* v. *Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005), a case decided while the government's en banc petition in this case was still pending. Like the decision here, *Resendiz-Ponce* invoked the *Du Bo* rule and ordered the dismissal of an indictment due to its failure to allege an essential element of a crime. The petition in *Resendiz-Ponce* is currently due on February 8, 2006.

In light of his decision to authorize certiorari in *Resendiz-Ponce*, on January 24, 2006, the Solicitor General also authorized the filing a petition for a writ of certiorari in this case that asks the Supreme Court to hold this case pending its decision on the petition in *Resendiz-Ponce*. The petition in this case is currently due on February 28, 2006.

DISCUSSION

1. Fed. R. App. P. 41(d)(2)(B) presumptively limits the duration of a stay of the mandate to 90 days, a time limit that tracks the requirement that petitions for writs of certiorari be filed within 90 days of the entry of the judgment. See S. Ct. R. 13.1. But Rule 41 expressly permits a further extension of the stay *either* "for good cause" *or* "unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay," in which case "the stay continues until the Supreme Court's final disposition." Fed. R. App. P. 41(d)(2)(B).

There is presently "good cause" for a further extension of the November 9, 2005 stay. The Solicitor General has now authorized the filing of a certiorari petition in this case, but due to the press of other matters, has requested an extension of time in which to file that petition to and including February 28, 2006 -- 21 days after the stay would expire. The stay previously entered in this case should therefore be extended to prevent the mandate from issuing during the window of time after the stay would otherwise expire but before the certiorari petition is filed (i.e., between February 7th and 28th). And, upon the filing of that petition, the government will promptly notify the clerk of this Court in writing of that filing, which, by rule,

will automatically extend the stay pending the Supreme Court's final disposition.

2. Michael Sherwood, counsel for the defendant, opposed our original request for a stay of the mandate, and we therefore have assumed that he will oppose this request as well.

WHEREFORE, the Court should grant the government's Motion to Further Extend the Stay of the Mandate for Good Cause pending the filing of a certiorari petition.

Respectfully submitted,

WILLIAM W. MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
District of Montana

By /s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney, United States
Department of Justice
Criminal Division, Appellate
Section
950 Pennsylvania Avenue NW
Room 1264
Washington, D.C. 20530
(202) 514-3308
michael.rotker@usdoj.gov

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing motion has been sent this 25th day of January 2006 by first class mail, postage prepaid, to:

Michael J. Sherwood, Esq.
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

/s/ Michael A. Rotker
MICHAEL A. ROTKER
Counsel of Record for the
United States